JUL 20 1992

92-92-8

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BODINE'S INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated, EDWARD BODEN, SR., EDWARD BODEN, JR. ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TERASURE ISLAND FOODS, INC., individually and as representatives of a class; and the KROGER CO.,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

BRIEF OF AMICUS CURIAE OF CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ILLINOIS MANUFACTURERS ASSOCIATION, ILLINOIS CHAMBER OF COMMERCE and MID-AMERICA LEGAL FOUNDATION

MARTHA A. CHURCHILL,
General Counsel
MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive
Suite 1721
Chicago, Illinois 60606
(312) 263-5163
Attorney for Amici Curiae

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MOTION OF CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ILLINOIS MANUFACTURERS ASSOCIATION, ILLINOIS CHAMBER OF COMMERCE, and MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Illinois Chamber of Commerce, the Chicago Association of Commerce and Industry, Illinois Manufacturers Association, and the Mid-America Legal Foundation join in requesting this Court grant leave to file the attached brief *Amici Curiae* in support of a Petition for Certiorari filed by defendants Bodine's, Inc.

The four *Amici* are greatly concerned about the economic welfare of the State of Illinois and the Midwest region. These organizations urge this honorable Court to grant appellant's

Petition for Leave to Appeal, as plaintiffs in this matter are seeking to create new and expensive class action law termed "fluid recovery."

The defendants in this case sold an orange juice blend which was mislabeled as 100% pure orange juice. Plaintiffs seek to punish the defendant for that misrepresentation, as the juice contained some additional ingredients.

Plaintiffs have no plausible plan to reimburse or even identify the thousands or perhaps millions of consumers who may have purchased the product. Instead, several named plaintiffs are serving as examples of the class as a whole. The named plaintiffs suffered somewhere between about 30¢ and $2 each in damages during the mid-1980's. They calculate their loss as the difference between what they paid for the product and the actual value of the juice blend.

Additional members of the "class" are not identifiable. Plaintiffs do not intend to notify them of this action either by mail or by publication. Under "fluid recovery," members of the class are not expected to make individual claims or receive compensation.

Under a traditional class action, any attempt to notify thousands or millions of persons for a 30¢ claim would be ludicrous, as the cost of administration would far outweigh the recovery to the class members. No one seriously expects a crowd of claimants to flood the courts with grocery store receipts, willing to testify they bought this brand of juice years ago. No claimant in his right mind would go to that trouble for a judgment which will probably amount to less than one dollar, depending on how much juice he bought.

Plaintiffs intend to overcome this obstacle by introducing "fluid recovery" to Illinois law. Through the use of statistical estimates and marketing data, plaintiffs hope to ignore their nominal losses and concentrate on possible unjust enrichment to

the defendants. Plaintiffs plan to figure damages based on the manufacturing costs of an orange juice drink as compared with 100% juice.

If "fluid recovery" is allowed here, this case potentially could generate a huge award since a jury, persuaded by evidence of fraud, may apply punitive damages.

But what will happen to the judgment awarded in this case? Who gets the money when only a handful of plaintiffs in the class have been found? Again, plaintiffs intend to apply the "fluid recovery" approach. A massive class action trial will be conducted in the absence of the class members. A substitute group is to receive the money in a symbolic gesture. Plaintiffs say that after paying their attorney fees, the proceeds of this judgment would go to lower the price of this orange juice brand for the benefit of *future* juice drinkers.

Amici herein have an interest in this case because they fear plaintiffs' "fluid recovery" plan will completely reverse settled class action law in Illinois, while imposing tremendous economic hardship on businesses and consumers in this State and throughout the country.

The "fluid recovery" plan proposed by plaintiffs and upheld by the Appellate Court makes no effort to find and compensate any flesh-and-blood plaintiffs for any actual injuries. Instead, plaintiffs would introduce court-sponsored market controls on orange juice prices, which will cause a loss of sales to competing juice producers. Thus "fluid recovery" would harm the juice market while doing nothing for the affected consumers of identified as members of the "class."

Apparently, the only "class" of persons certain to benefit from this expensive class action suit will be plaintiffs' counsel.

With rising costs of litigation impeding American business and contributing to our current recession, this novel "fluid recovery" idea will cause a great deal of additional damage to the economy in Illinois and elsewhere.

Amici herein fully support accurate labels on all consumer products sold in this State and elsewhere. However, "fluid recovery" will do nothing to further consumer rights, and will simply add to the litigation explosion by allowing class actions without the necessity of any real, damaged plaintiffs.

The **Chicago Association of Commerce and Industry** was founded in 1904. Its membership today consists of 2,500 businesses of all sizes and types. It maintains a high profile in the Chicago area with civic and educational activities. It's stated purpose, among other things, is to provide "...One singular voice of business, representing the unique and particular needs of the Chicago area at the local, regional state, and national level."

The members of CACI therefore have a direct interest in the outcome of this matter, and request this Court to allow them to file this brief as *Amicus*.

The **Illinois Chamber of Commerce** was founded in 1929 and today represents over 5,000 members. It is active in all areas which affect business, including the cost of litigation to the business community. Insurance costs for liability, health, and worker's compensation are all affected by the growth of lawsuits in America.

The Illinois Chamber is devoted to protecting the interests of business before government in Springfield and in Washington.

The **Illinois Manufacturers Association** began in 1893, and now has about 4,800 members across the State of Illinois. Many of its members will be affected by the controversy here and have a great interest in the Petitioners' Request for Leave to Appeal. The IMA is involved in a variety of activities which affect the business climate in the state. It is devoted to keeping Illinois manufacturers competitive in the world market, and favors responsible laws and regulations in all areas which impact on manufacturing.

The **Mid-America Legal Foundation** was created in 1975 as a non-profit public interest law firm. Its purpose is to advocate

on behalf of free enterprise in federal and state courts and in administrative tribunals. MALF serves seven Midwestern states: Illinois, Minnesota, Ohio, Indiana, Wisconsin, Iowa, and Michigan, and frequently participates in legal disputes where critical free market principles are threatened.

Therefore, the three organizations all respectfully request leave to file the attached Brief as *Amici Curiae*.

Martha A. Churchill, General Counsel
Mid-America Legal Foundation
20 N. Wacker Dr., Suite 1721
Chicago, IL 60606
(312) 263-5163
Attorney for Amici Curiae

Dated: July 17, 1992

The Petitioner agreed to allow our Brief as Amici, but the Respondent refused, necessitating this Motion.

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INTRODUCTION AND STATEMENT OF FACTS

This matter arises from mislabeled orange juice produced by defendant Bodine's, Inc. from 1978 to 1985. Allegedly the company added distilled water, corn syrup, grapefruit solids, or other additives, creating a mixture of orange juice and orange drink. The produce was sold as "pure orange juice" and thus not properly labeled.

Plaintiffs claim the company's misconduct allowed it to obtain a greater share of the orange juice market through lower prices.

In 1985, Bodine's, Inc. was sold. The buyers knew nothing of the company's past deeds. The new owners have always produced pure juice products, all accurately labeled.

Following the sale, an investigation was conducted of the prior owners' manufacturing practices. In July, 1989, Defendants Edward Boden, Sr. and Edward Boden, Jr. were charged with selling adulterated food in a multi-count Federal indictment. They were sentenced in the United States District Court for the Northern District of Illinois on February 27, 1990. Edward Boden, Sr. was fined $200,000 and sentenced to two years in prison along with 1,000 hours of community service. His son was fined $200,000 and sentenced to two years probation and 200 hours of community service.

Plaintiffs filed this class action against the Bodens and their former company, Bodine's, Inc., in July 1989. The very day the Bodens were sentenced, plaintiffs filed their third amended complaint in the Circuit Court of Cook County. Mirroring the Federal indictment, plaintiffs allege that Bodine's Inc. sold an orange juice blend mislabelled as "100% pure" orange juice.

Plaintiffs claim they suffered economic loss as consumers of Bodine's products between the years 1978 and 1985. They seek the difference between the 100% pure juice they paid for and the orange drink mixture they received. On behalf of millions of consumers nationwide, plaintiffs claim they are entitled to this differential in value.

Six individuals are named as plaintiffs, all of whom will testify at trial that they purchased this product in varying amounts. They expect their efforts to yield a partial refund in the price they paid for orange juice, depending on the quantity of this product they purchased and consumed.

Because of difficulties identifying, notifying, and compensating the millions of other class members, plaintiffs propose use of "fluid recovery." That doctrine will permit them to proceed with the lawsuit without notifying any other class members.

In calculating the damages, plaintiffs intend to invoke "fluid recovery" to allow them to focus on defendants' unjust enrichment rather than their own nominal losses. They propose a trial to determine the extent of defendants' profits as a result of the wrongful behavior, and to determine what punitive damages should be awarded. Claims are made for RICO, consumer fraud, and violation of various consumer protection statutes.

Plaintiffs expect that a verdict may greatly exceed the needs of six persons seeking partial refunds on orange juice.

The remainder of the fund, considered "fluid," will not be transferred to members of the class. Instead, it is earmarked for some project considered beneficial to orange juice consumers in general--in this case, they intend that Bodine's, Inc. be ordered to reduce its prices until the "fluid" fund is depleted. If that is not possible, the money will go to the State, according to the lower court decision.

The use of "fluid recovery" to sustain an otherwise unmanageable class action suit is justified by the Appellate Court of Illinois on the grounds that defendants' criminal behavior calls for the "disgorging" of defendants' "ill-gotten gains." Plaintiffs have argued that the criminal system is insufficient to deter white collar crime, thus necessitating the use of creative class action lawsuits for the public good.

Before now, "fluid recovery" has been rejected by every Court to consider it, except California. The decision below opens the door in Illinois for class action lawsuits, national in scope, in which members of the "class" will receive no notice of the lawsuit and no compensation.

The many defects in "fluid recovery" are set out below. Amici herein view the price-cut proposal herein as improper tampering with the free market system and a possible violation of anti-trust laws. The Appellate Court upheld "fluid recovery" because it purportedly protects the public, but in fact this system will harm consumers and disrupt the market. In addition, the use of a class action lawsuit in this case will deprive defendants of Due Process.

The only "class" of persons who can benefit from this type of legal innovation will be attorneys bringing these actions.

STATEMENT OF INTEREST OF AMICI CURIAE

The Chicago Association of Commerce and Industry was founded in 1904. Its membership today consists of 2,500 businesses of all sizes and types. It maintains a high profile in the Chicago area with civic and educational activities. Its stated purpose, among other things, is to provide ". . . One singular voice of business, representing the unique and particular needs of the Chicago area at the local, regional, state, and national level."

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ARGUMENT

I. "FLUID RECOVERY" VIOLATES CLASS ACTION REQUIREMENTS FOR MANAGEABILITY

Plaintiffs argue forcefully that the "fluid recovery" issue be divorced from any discussion as to whether the class is manageable. Such a distinction is impossible because the only purpose for "fluid recovery" is to overcome the usual obstacles of an unmanageable class action lawsuit.

Existing Illinois law provides for class action lawsuits only where the class is manageable. According to Section 2-801 of the Code of Civil Procedure (Ill. Rev. Stat. ch. 110, par. 2-801 (1989)), a class action may be maintained if: ". . . (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy."

Ordinarily, the members of the class must be identifiable. *Hayna v. Arby's*, 99 Ill. App. 3d 700, 425 N.E.2d 1174 (1st Dist. 1981). In addition, the amount of the recovery for each person must be worthwhile, or at least sufficient to cover the administrative costs and other expenses. *Id.*; *Adams v. Jewel*, 63 Ill. 2d 336, 348 N.E.2d 161 (1976).

In the case at bar, plaintiffs may number in the millions. Each individual may be entitled to varying amounts, depending on the quantity of this product he or she purchased and consumed during the time period in question. This case is a classic example of an unmanageable class action lawsuit: millions of persons making varied and individual claims, all with no objective verification possible.

"Fluid recovery" is a device to avoid the usual problems of an unmanageable lawsuit. The plaintiffs have no intent to notify members of the purported "class" beyond those already named as plaintiffs. The judgment will not be based on the losses suffered by injured parties. And finally, the proceeds of the lawsuit will

not be turned over to the plaintiff "class." Instead, the funds are to be used for any symbolic purpose chosen by plaintiffs as suitable under the circumstances.

II. NAMED PLAINTIFFS HEREIN MAKE NO EFFORT TO PROTECT THE INTERESTS OF OTHER CLASS MEMBERS

The Court below summarily found that the named plaintiffs adequately represent the class of past orange juice drinkers who purchased or consumed defendants' product. Apparently the Court was unaware or did not consider the impact of "fluid recovery" on the role of named plaintiffs here.

We agree that named plaintiffs represent the class in the sense that they are *examples* of consumers who purchased the product. But these named plaintiffs clearly are not watchdogs for the rights of the class as a whole. This is apparent as the named plaintiffs have indicated no plans whatsoever to notify other class members of their rights in this action.

It seems the plaintiffs have simply given up on the expediency of expensive mailings or publications on a nation-wide basis where the members of the class are unidentifiable and totally diverse. Furthermore, no sane person would exercise his "rights" to join a lawsuit and testify so as to "recover" an award which may be less than $1, depending on the amount of orange juice he bought or drank during the mid-1980s.

Through "fluid recovery," plaintiffs have solved that problem by eliminating all consideration of the class as a whole. There will be no effort to notify class members of their rights or assist them in making claims. In this manner, named plaintiffs have greatly simplified the process of a class action lawsuit. By giving no notice to members of the affected class, plaintiffs save themselves most of the expenses normally associated with class actions. And the court need not make any provisions for a stampede of claimants seeking recompense for the loss in value of their orange juice.

But the plaintiffs clearly are not "representing" the interests of other members of their class under their proposed "fluid recovery" system. Named plaintiffs are not in fact protecting anybody else's rights; they are merely ornamental, enabling their attorneys to bring the lawsuit.

Such a situation surely is not unique to the case at bar. In any action where "fluid recovery" may be suggested as a convenient device for class action lawsuits, the "class" of injured plaintiffs will be a legal fiction; a dress code required for entry to the class action format.

The entire procedure flies in the face of centuries-old legal traditions. In civil disputes, the courts assume that the named parties have a real interest in the outcome of the case. Mere symbolic gestures are not well suited to tort lawsuits. Here, plaintiffs have expressed a desire to make a point about fraudulent labeling practices and adulteration of food. But they are not doing so in the interests of the class they supposedly represent.

It is important to note that under "fluid recovery," those who are meant to receive the proceeds of this lawsuit are a different group than those who suffered the loss. Allegedly, those who purchased and consumed defendants' product between 1978 and 1985 suffered economic harm and request compensation. But under "fluid recovery," the proceeds of this lawsuit will not go to those individuals. Instead, it will be given to *future* juice drinkers, whom we shall refer to as the "beneficiaries." The lower Court made no mention of this unusual arrangement: under "fluid recovery," the plaintiffs who suffered the loss are not those who will receive the proceeds of the verdict.

Obviously the named plaintiffs in this particular matter are in no position to "represent" (protect) the rights of the beneficiary class. Such a situation is hardly surprising when "fluid recovery" is requested. Where named plaintiffs are unconcerned what use will be made of the proceeds of a lawsuit, it cannot be said that those named plaintiffs are protecting the interests of the plaintiff "class" or the beneficiary "class."

III. "FLUID RECOVERY" WREAKS HAVOC ON THE MARKET AND COULD RAISE TAXES

If named plaintiffs are doing a poor job protecting the rights of the plaintiff class, they are doing a worse job protecting the rights of the "beneficiaries," the future juice drinkers slated to enjoy the fruits of this lawsuit. Supposedly, the verdict against defendants will be used to fund a price cut for defendants' orange juice. This is justified on some sort of equitable grounds, as plaintiffs have expressed they intend to deprive defendants of their "unjust enrichment."

The problem is that the price-cut scheme will not in fact benefit the supposed "beneficiaries." As with most governmental efforts at price control, this one will fail to achieve its desired goal.

First, a price cut by a juice manufacturer will simply result in windfall profits to the distributor. A distributor may have no reason to pass on a price savings to the retail outlets.

Second, the retailers may decide to price defendants' juice at the market rate, despite a price cut from the manufacturer. Lower prices charged by the manufacturer cannot guarantee any savings to the ultimate consumers.

Third, the proposed price cut *will* result in a disruption of the marketplace for juice manufacturers. It is unclear whether such a court-ordered plan might violate some anti-trust laws, but one thing is certain: if defendants undercut their competition, they will gain a larger share of the market. *Other orange juice producers will suffer losses, not necessarily Bodine's, while individual consumers will likely benefit nothing.*

The price-cut plan proposed by plaintiffs as a benefit to future juice drinkers is reminiscent of attempts by Socialist governments to control prices. Such efforts have met with dismal failure. *Amici* herein certainly hope that Illinois Circuit Court judges will refrain from manipulating the market through artificial price controls.

Furthermore, in calculating methods to benefit future orange juice consumers, plaintiffs conveniently ignore the fact that the current owners of Bodine's, Inc. are now subject to significant defense costs as a result of this very lawsuit. It is no secret: directly or indirectly, a company has no choice but to pass on such costs to consumers. **If plaintiffs are serious about assisting orange juice drinkers through lower prices, we suggest they dismiss this lawsuit, thus saving the company huge legal expenses and allowing a real savings to the American public.**

Michigan courts came to exactly the same conclusion. *See Cicelski v. Sears*, 348 N.W.2d 685 (Mich. App. 1984). Plaintiffs in *Cicelski* sought recovery of interest overcharges from a large retailer. The process would have involved refunds to over a million charge customers to reimburse them at perhaps a few pennies per person. In refusing to allow a "fluid recovery" class action lawsuit, the court commented that the plaintiffs themselves would suffer from it in the long run, because the store's costs eventually would show up in higher prices:

> [A court should be] concerned, and legitimately so, that the costs of calculating and distributing individual damage awards could be grossly disproportionate to the size of those awards; ...these costs would ultimately be passed on to defendants' customers.

Cicelski, 348 N.W.2d at 688.

Michigan expressly rejected "fluid recovery" on economic grounds. As reported in *Cicelski*, the trial judge also wrote caustically that "the primary beneficiary of these proceedings would most likely be the attorneys through fees." *Cicelski*, 348 N.W.2d at 689.

In the case at bar, the Illinois Appellate Court adopted the definition of "fluid recovery" provided by *Cicelski*, which defines the unclaimed portion of the damage fund (in this case, about 99 percent of it) as the actual fluid recovery. This money

is to be either distributed through the market in the form of a reduced charge for an item defendants previously overpriced, or it is given to the state to use on a project likely to be of interest to class members. If that is not possible, the state may spend it for general purposes. *Cicelski*, 348 N.W.2d at 689.

As stated above, plaintiffs' simple-minded attempts to engage in market controls will ultimately backfire in the form of higher prices for consumers. If price control is a bad idea, a gift to the state is even worse. No citizen in his right mind would want to prosecute a lawsuit simply to have the money go to the state. Such an arrangement would amount to a court-sponsored tax hike. In effect, that is what plaintiffs in this case actually propose: under the "fluid recovery" doctrine as adopted by the Illinois courts, the bulk of the verdict could very well go to the state. **When money is transferred from the pockets of a citizen to the state treasury, that is effectively a tax.** And a tax by any other name is still a tax.

Since the affected consumers here are from many states, potentially this verdict may go to the federal government. But it is safe to say that few consumers would regard a payment to the IRS as a benefit to themselves.

As it now stands, the Illinois Appellate Court has adopted the above-described system for distributing the damage fund. *Amici* are astounded that use of a verdict for artificial price controls or for a tax hike could be construed as a "benefit" to consumers or to any other class of people.

One suspects that the price-cutting proposal offered here is merely a ruse, an afterthought by plaintiffs. The normal civil justice system assumes that a lawsuit is a means to an end--the verdict being the desired end. But here, the system is turned upside down. The verdict is the means to justify the lawsuit. Incredibly, under "fluid recovery," the lawsuit is seen as an end in itself. For the plaintiffs at bar, it is not important what happens to the money. The goal is to transfer funds in an effort to punish a wrongdoer (or simply to generate legal fees); how the money is used is incidental.

Any scheme to collect nickels and dimes through an unwieldy device like a class action lawsuit ought to raise immediate suspicion. "Fluid recovery" lawsuits attempt to defy basic economic law. But no amount of legal jargon can overcome this simple truth: no one is benefited by a system which costs him $50 to recover 50 cents.

IV. THESE PLAINTIFFS DO NOT, AND CANNOT, REPRESENT THE PUBLIC INTEREST

Plaintiffs claim "fluid recovery" is justified for the public interest. But as champions of the public, these plaintiffs leave a lot to be desired. In listing the actual victims of the alleged orange juice fraud, for example, plaintiffs have conveniently overlooked certain persons who suffered *real harm*:

* *Competitors*. Plaintiffs point out that Bodine's, Inc. added cheaper ingredients to its orange juice, allowing it to obtain a larger market share. Obviously Bodine's was able to undersell the competition, thus gaining an unfair advantage over competing juice producers. Ironically, in an effort to remedy past wrongs, plaintiffs propose the company cut its juice prices *again*.

* *New Owner*. Before he was convicted of any crime, Mr. Boden sold his business to an unsuspecting and innocent buyer. Besides being saddled with a massive class action suit along with tremendous defense costs, the new owner suffered negative publicity among Bodine's distributors and retailers along the chain of sale. Thus the purchaser of Bodine's, Inc. is yet another *victim* of this whole affair.

Strangely, in their zeal to find justice against wrongful labeling and marketing practices, plaintiffs propose this lawsuit for the expressed purpose of punishing one victim–the new owner of Bodine's, Inc.–to compensate for events over which he had no knowledge or control.

V. *"FLUID RECOVERY" AMOUNTS TO A QUASI-CRIMINAL ACTION MASQUERADING AS A CIVIL ACTION*

Make no mistake about it: plaintiffs in this matter seek to open an entirely new frontier in legal thinking through "fluid recovery." Phrases such as "ill-gotten gains" and "disgorgement," familiar terms of equity, are combined with some extraordinary demands for punishment. The result is that plaintiffs have first blurred and then stepped over the line between civil and criminal law.

Arguments by plaintiffs sound distinctly prosecutorial in tone. In advocating for "fluid recovery," plaintiffs discount their role as injured persons seeking compensation. Instead, they intend to compute the damages in accordance with defendants' wrongful conduct. They point to alleged criminal behavior and demand that the court function as a hanging judge.

Counsel for plaintiffs intentionally present themselves in the role of quasi-prosecutor. Note the emphasis they place on the supposed benefit this lawsuit will have on the American public rather than to the individual named plaintiffs or their purported "class." Adding together the juice consumers of the past with the consumers of tomorrow, it is apparent that the "class" which plaintiffs attempt to represent here is indistinguishable from the general public.

Plaintiffs admit their lawsuit is mainly punitive in intent, because the *total money damages being sought are not based on compensation proportionate to plaintiffs' injuries. These plaintiffs are asking for blood.* "Criminal penalties for white-collar offenses are no deterrent," plaintiffs proclaim. Scornful of the conventional sanctions within the criminal justice system (which in this case sent Mr. Boden to prison for two years and fined him and his son over $500,000), plaintiffs discount the significance of incarceration as mere "country club prison." *See* plaintiffs' Brief to the Appellate Court of Illinois, First District, p. 11.

Plaintiffs see the civil court system, through the use of "fluid recovery," as a step *beyond* criminal law. A criminal judge can merely put a prisoner behind bars. To inflict *real* punishment on a wrongdoer, plaintiffs say, make him the target of a class action lawsuit--a fate worse than jail.

That view is echoed in *Eisen v. Carlisle*, 479 F.2d 1005 (2d Cir. 1973), which points out the enormous defense costs associated with class action cases. Those costs ". . . have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim." *Id.* at 1019. The economic pressure on a defendant amounts to "legalized blackmail" in some instances. *Id.* at 1019.

VI. EFFORTS TO DISPENSE CRIMINAL JUSTICE AGAINST CORPORATIONS THROUGH "FLUID RECOVERY" WILL INEVITABLY RESULT IN DUE PROCESS VIOLATIONS

If this were a purely civil lawsuit to compensate identifiable victims for a wrong, it would make sense for the new owner of a business to make good on the loss. It is axiomatic that one who buys an ongoing business also buys its debts and obligations.

It is highly unusual, however, that one who purchases a business is thereby subject to personal criminal liability for the acts of another. Yet through the use of "fluid recovery," plaintiffs attempt to do just that. Plaintiffs emphasize the criminal conduct of Mr. Boden personally as a basis for this unusual "fluid recovery" lawsuit. Plaintiffs themselves urge the use of class action lawsuits, especially "fluid recovery," as a necessary substitute or supplement to criminal charges.

Upon close examination, plaintiffs' expressed desire to punish the defendant will not have the intended result. Though the current Bodine's, Inc. is under new ownership producing a pure, 100% orange juice product, plaintiffs would have this company stand in and atone for the prior owners' criminal acts. In reality, the Bodens themselves will not be affected by the punishment meted out on the buyer of their business. But

punishment is the whole purpose of "fluid recovery," and so somebody must pay. The new owners of Bodine's, Inc. therefore are required to stand in as a symbolic whipping boy for the real wrongdoer. The arrangement apparently will remain satisfactory to plaintiffs, so long as the stand-in defendant remains solvent.

This Court might be tempted to step in and "prosecute" a wrongdoer through a class action lawsuit in some cases where the criminal justice system has failed. However, *Amici* herein suggest such matters be left to the legislative branch. In this instance, the wrongdoers were in fact caught by the system and punished. If plaintiffs are unhappy that the punishment imposed here was insufficient, they should have made their opinions known to the prosecutor and judge at the time of sentencing. It will not do for the plaintiffs to bring a separate action later, a sort of civil Double Jeopardy, where they perceive the sentence to be insufficient.

With modern corporations undergoing almost constant changes in personnel, shareholders, management, and ownership, "fluid recovery" could pose a real threat to the due process rights of corporate citizens. Moreover, if "fluid recovery" is adopted as part of Illinois law, we can expect large numbers of frivolous class action lawsuits to be filed against the business community, as few private individuals can pay the massive awards and settlements of this high-stakes litigation. With the emphasis here on criminal-style *punishment* rather than civil-style *compensation*, no doubt corporations will find themselves paying for the criminal acts of others on a regular basis.

Illinois should not allow private quasi-criminal class actions under the banner of "fluid recovery." Such lawsuits make no provision whatsoever to protect the rights of subsequent shareholders, managers, and others within the corporate community. As plaintiffs correctly point out, a class action lawsuit is perhaps worse punishment than a prison term. Yet plaintiffs would bring down this calamity on any unwitting persons who happen to be associated with the corporation when,

years later, a lawsuit is brought. Such a system is about as fair as placing someone in prison because his neighbor committed a crime.

VII. NOT ALL SOCIAL ILLS ARE AMENABLE TO REPAIR BY THE COURTS

Plaintiffs suffered a real loss when they purchased an orange drink/juice mixture which was mislabeled as pure orange juice. *Amici* herein condemn any corporation which mislabels its products or adulterates food. However deplorable that conduct was, though, the fact remains that the members of the plaintiff "class" suffered more a moral loss than an economic one. It should not be the function of Illinois courts to convert moral losses into economic penalties, especially where the problem already has been addressed legislatively.

Earlier in this century, a book describing conditions in the meat packing industry caused a great public outcry. *The Jungle* by Upton Sinclair helped contribute to creation of the Food and Drug Administration. Americans have long viewed food adulteration as unacceptable, but the issue has been addressed by the legislature. Illinois courts would be stepping beyond their authority to duplicate the FDA's function solely because a class action suit has been filed.

Amici herein are deeply disturbed by the Due Process and other implications of "fluid recovery" in Illinois. As an alternative to conventional criminal justice, it is a poor substitute. The tort system is not an appropriate format for dispensation of criminal justice, as it lacks the safeguards which can be expected from conventional legal and administrative penalties.

Furthermore, plaintiffs in a class action lawsuit such as this cannot be expected to sacrifice their own interests in favor of the public good. This court should not lose sight of the fact that the plaintiffs represent their own economic self-interest, pure and simple. Within the framework of a civil tort system, such economic self-interest is perfectly acceptable. But as champions

of the broad public good, a handful of past orange juice consumers can hardly substitute for the legislative and executive branches of our government.

Amici herein are not alone preferring legislative solutions to broad social ills. No matter how well-intentioned, class action lawsuits by their nature have certain limitations in terms of the social benefits which can be obtained:

> It seems doubtful that [fluid recovery] can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. *If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.*

Eisen, 479 F.2d at 1019 (emphasis added).

VIII. PROLIFERATION OF MASS LITIGATION DAMAGES THE ECONOMY

A dangerous trend has appeared in the law, as ever-larger and more massive litigation proliferates. Peter Huber sums it up very well in his book, *Liability, The Legal Revolution And Its Consequences*, (Basic Books, Inc.) (1988):

> Today no case is too unwieldy for a court, no exposure too low, no injury too uncertain, no class of actual or potential victims too large, no list of defendants too long. A legal system once concerned with individual justice is now a principal center of social engineering.

> ...Matters of public policy, once considered to be so broad-ranging that only the political branches of government could address them, are now routinely squeezed into the mold of a lawsuit....

Huber, *supra*, at 82-83.

Even when used properly as a tool for dispute resolution, the tort system is notoriously cumbersome and inefficient.

According to the 1990-91 Annual Report of the Institute for Civil Justice (the "Rand Report"), the processing costs for civil cases in the U.S. has risen to an estimated $2 billion, not counting what the litigants themselves pay. Rand Report, p. 50.

The system is overloaded, partly as a result of creative theories such as seen in the case at bar. The result is enormous inefficiency, so that only a paltry sum reaches the pockets of injured persons as compared with the resources spent on the litigation process itself. According to the Rand Report, plaintiffs receive an average of only 46 percent of the total expenditures on a civil case. *Id.* at p. 51. The percentage worsens with mass litigation such as asbestos lawsuits, where the plaintiff's portion drops to only about 39 percent. *Id.* at p. 55. Even those estimates may be overly optimistic. According to Huber, plaintiffs only receive about a third of the total expenditure in a typical lawsuit. Huber, *supra*, at 151.

The effect of all this on our nation's industry is devastating. Crippled by insurance costs, American business is hampered as compared with foreign producers. Coincidentally, the U.S. population currently includes about three attorneys per 1,000 residents, compared with only 0.8 per 1,000 in Germany and 0.5 in France. The American Bar Association estimates one million lawyers will be available in the U.S. by the year 2000.

Manufacturers now avoid new or innovative products as a reaction to the current liability system. Class action lawsuits are among the worst offenders, causing shotgun-wedding type settlements, the costs being passed on to consumers.

The problem is analyzed well by Theodore B. Olson, a noted author, in his article *The Social Consequences of Punitive Damages*, published by the National Legal Center in the Public Interest (August 1990):

> Ultimately, we have added immense costs to our productivity in order to pay for an army of lawyers, warehouses full of pleadings, and platoons of court attaches. These consequences affect our capacity to compete as a society when we can least afford it. Someone observed that if we are to compete with the Japanese we must export one product to Japan: lawyers.

Olson, *supra*, at 60.

This type of anti-lawyer sentiment should come as no surprise as Americans come to realize that the cost of living must rise as a greater share of our gross national product is consumed by our litigation system. The National Association of Manufacturers estimates as much as 10 percent of our GNP is spent on litigation. "Fluid recovery" promises to increase these costs further still.

More importantly, a massive, unwieldy case such as the one at bar threatens to push aside other, more valid cases--ones with real plaintiffs who have suffered actual injury.

IX. IF ILLINOIS ENDORSES "FLUID RECOVERY," IT WILL BECOME A MAGNET FOR FRIVOLOUS AND BURDENSOME CLASS ACTION LAWSUITS

So far, California is the only state, other than Illinois, which has allowed a "fluid recovery" class action lawsuit. *Darr v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1976), and *Bruno v. Superior Court*, 179 Cal. Rptr. 342 (1981). There is some possibility the California courts have seen the error of their ways. Though not specifically reversing themselves, California courts have found reason to distinguish and limit future growth of the system. *Collins v. Safeway Stores*, 231 Cal. Rptr. 638 (1986)

The Illinois Appellate Court justified the use of "fluid recovery" in this case based on *Cicelski*, 348 N.W.2d 685; *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981). But the *Cicelski* court expressly rejected the "fluid recovery" doctrine.

Simer, likewise, is an indictment of the "fluid recovery" doctrine. Despite efforts in that case to settle, the Seventh Circuit refused to endorse a settlement which provided for no notice to members of the class. Alluding to the "legalized blackmail" problem mentioned in *Eisen*, the *Simer* court worried about plaintiffs who might "append the class claim merely to strengthen their bargaining power in settlement discussions." *Simer*, 661 F.2d at 665.

X. *THIS ACTION, BY UTILIZING "FLUID RECOVERY," CONTRIBUTES TO THE POOR PUBLIC IMAGE OF THE LEGAL PROFESSION*

The American legal profession has suffered ridicule both here and abroad because of cases such as this, where someone goes to court over a 39-cent can of frozen orange juice.

A case exactly like the one at bar was splashed across the front page of the *Wall Street Journal* recently, exposing the seamy underside of a class action lawsuit against a musical rock group. *See The Mouthpieces: Class Action Lawyers Brawl Over Big Fees In Milli Vanilli Fraud*, Wall St. J., Oct. 24, 1991, at A1.

According to the *Journal* article, one judge detected a "strong-odor" from the attorneys, as they apparently had recruited their clients solely to generate outrageous legal fees. The musical group in that case had committed fraud by selling their "Girl You Know Its True" album as their own work when in fact other singers' voices were used. The plaintiffs in that case did not claim any serious damages from the fraud; a situation startlingly like the case at bar.

Amici herein believe this very case could potentially generate negative publicity for the legal profession, as a casual observer might wonder whether the lawyers are simply exploiting trivial injuries to make a buck. That reasoning was reflected in the

Cicelski decision, which denied an award of attorney fees since the lawsuit provided no benefit to the plaintiff class. *Cicelski*, 348 N.W.2d at 692.

CONCLUSION

Plaintiffs would have this Court discard centuries of jurisprudence by adopting an innovation called "fluid recovery." If this type of lawsuit is allowed to go forward, class action lawsuits will be possible with fictional plaintiffs, phantom beneficiaries, and even substitute defendants.

With "fluid recovery," it is the symbolism that counts, not the reality. Absent plaintiffs, absent defendants, and absent recipients of the proceeds, the new and creative class action can proceed nevertheless if the decision by the Court below is allowed to stand.

Amici therefore urge this Court to grant Defendants' Petition for Leave to Appeal in this matter, and reverse the lower court ruling.

Respectfully submitted,

Martha A. Churchill, General Counsel
Mid-America Legal Foundation
20 N. Wacker Drive, Suite 1721
Chicago, IL 60606
(312) 263-5163
Attorney for Amici Curiae

Dated: July 17, 1992